TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 232.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN H. ALLISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED FEBRUARY 1, 1902.

(18,392.)

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1 *Petition for Writ of Error to the Supreme Court of the United States.*

In the Supreme Court of North Carolina.

JOHN H. ALLISON, Plaintiff,
against
THE SOUTHERN RAILWAY CO., Defendant. } No. 473.

To be styled The Southern Railway Company, plaintiff in error, against John H. Allison, defendant in error.

To the Honorable David M. Furches, chief justice of the supreme court of North Carolina:

The petition of the Southern Railway Company respectfully showeth that it is the defendant, and plaintiff in error, in the above-entitled action, wherein J. H. Allison is the plaintiff, and defendant in error, and as such defendant it appealed from a judgment rendered against it in the superior court of McDowell county, at October term, 1901, for two thousand ($2,000) dollars and costs; that in the said action defendant Southern Railway Company, your petitioner, on June 25, 1901, submitted to his honor James E. Boyd, United States judge, sitting as a judge of the United States circuit court for the western district of North Carolina, in which district the county of McDowell is situate, a petition for the removal of said suit or civil action of J. H. Allison against The Southern Railway Company to the circuit court of the United States for the western district of North Carolina upon the ground of local prejudice; that such petition was presented in due form and was supported by sufficient affidavits as required by law, and that the bond required was filed; that on the 25th day of June, 1901, the said James E. Boyd, United States judge duly adjudged that the said defendant, your petitioner, on account of prejudice and local influence, could not obtain justice in the superior court of McDowell county, nor in any other court to which the defendant might, under the laws of the said State, have the right on account of said prejudice and local influence to
2 remove the same, and ordered the removal of the said cause and directed the clerk of the superior court in the county of McDowell to certify the said civil action to the said United States circuit court for the western district of North Carolina; that the said petition, affidavit, bond and order of removal were duly certified to the superior court of McDowell county, and at August term, 1901 of the said superior court the defendant moved that the said court should proceed no further in the said action and that the case should be dismissed. This motion was at the said August term, 1901, overruled, and an order made by the judge holding said court, which appears in the record herewith submitted, that the said State court declined to surrender jurisdiction of the said cause and that the said defendent was not entitled to remove the cause to the Federal court. Thereafter, to wit, at October term, 1901, the defend-

ant again moved to dismiss the cause or to continue the same, and the same was refused and the case was tried as appears in said record; that in said cause at the October term, 1901, a verdict was rendered against the said defendant and judgment rendered therein that the plaintiff have and recover of the defendant the sum of two thousand dollars and the costs of this action. That the defendant moved for a new trial and excepted to the said judgment, and the motion being refused and the exceptions being overruled, appealed in open court to the supreme court of North Carolina. That upon the said appeal the defendant, among other errors, assigned the following: The refusal of the said superior court to dismiss the cause, because the same had been regularly removed to the Federal court as provided by law.

That the said appeal came duly to be argued in the said supreme court of North Carolina, and on the — day of December, 1901, an opinion was filed in the said cause by the said supreme court of North Carolina, which is the highest court of law and equity of the said State, in which a decision could be had in the said suit, affirming the said judgment of the said superior court of McDowell county and deciding against the title, right, privilege and exemption set up and claimed under a construction of a statute of the United States, to wit, the statute authorizing the re-
3 moval of causes from the courts of the State to the circuit courts of the United States by the said Southern Railway Company, your petitioner, all of which will fully and at large appear by the record in said cause and the opinion of the supreme court of North Carolina filed in this behalf, which are hereby referred to and made a part of this petition. And under and by virtue of the Constitution and laws of the United States the defendant, your petitioner, is entitled to a writ of error issuing from the Supreme Court of the United States, directed to the chief justice and associate justices of the supreme court of North Carolina, directing the record and proceedings therein to be certified and sent to the Supreme Court of the United States in order that the error, if any there be, may be corrected.

Your petitioner further asks that the said writ of error be allowed by your honor, and that the bond herewith filed be approved, and that the clerk of the said supreme court of North Carolina be directed to certify the said record to the said Supreme Court of the United States and to do any and all things proper to be done in this behalf.

F. H. BUSBEE,
Attorney for the Southern Railway Company.

Sworn to and subscribed before me this the 24 day of December, 1901, — F. H. Busbee.

[L. S.] H. E. LITCHFORD,
Notary Public.

(Endorsed:) "The within petition is granted and writ of error allowed. David M. Furches, chief justice supreme court of North Carolina." "Filed Jan'y 8, 1902 in the supreme court of N. C."

4 *Writ of Error to the Supreme Court of North Carolina.*

In the Supreme Court of the United States.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
J. H. ALLISON, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the chief justice and associate justices of the supreme court of North Carolina, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of North Carolina before you, being the highest court of law or equity in the said State, in which a decision can be had in the suit between J. H. Allison, the plaintiff, and The Southern Railway Company, defendant, wherein was drawn in question the validity of an authority exercised under a statute of the United States, and the decision was against its validity, and wherein was drawn in question the validity of a statute of, or of an authority exercised under a statute of said State on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of its validity, and wherein was drawn in question the construction of a statute of the United States and the decision was against the right, title, privilege and exemption specially set up or claimed by the Southern Railway Company under such statute, a manifest error hath happened to the great damage of the said Southern Railway Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings therein, with all things concerning the same,
5 to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the — day of —— next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct the error, what, according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 4th day of January, in the year of our Lord one thousand nine hundred and two.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk U. S. Circuit Court, E. D. N. C.

Allowed by
DAVID M. FURCHES,
Chief Justice Supreme Court of North Carolina.

[Endorsed:] Original. Southern Railway Co., plaintiff in error, *vs.* J. H. Allison, defendant in error. Writ of error. Filed Jan'y 8, 1902 in the supreme court of N. C.

6 (Title of Cause.)

Know all men by these presents, that we, Southern Railway Company, a corporation, and A. B. Andrews, a citizen and resident of the State of North Carolina, are held and firmly bound into the above-named J. H. Allison, defendant in error, in the sum of four thousand dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents. Signed, sealed and dated the — day of December, 1901.

Whereas the above-bounden Southern Railway Company has sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of North Carolina, affirming the judgment for two thousand dollars and costs theretofore rendered by the superior court of McDowell county, North Carolina,

Now therefore the condition of this obligation is such that if the above-named Southern Railway Company prosecute said writ of error to effect and answer and pay all damages and costs in the Supreme Court of the United States and all other courts and discharge said judgment in full, if it fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

SOUTHERN RAILWAY COMPANY, [SEAL.]
By F. H. BUSBEE, *Attorney.*
A. B. ANDREWS, [SEAL.]

A. B. Andrews, being duly sworn, saith that he is worth double the amount specified in the above bond, above all debts, liabilities and exemptions allowed by law.

A. B. ANDREWS.

Sworn to and subscribed before me this 24 day of December, 1901.
[L. S.] W. T. SMITH, *N. P.*

Approved:
DAVID M. FURCHES,
Chief Justice Supreme Court of North Carolina.

Endorsed: "Filed Jan'y 8, 1902 in the supreme court of N. C."

7 UNITED STATES OF AMERICA:

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
J. H. ALLISON, Defendant in Error. } Citation.

Upon writ of error from the supreme court of North Carolina.

To J. H. Allison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of North Carolina, wherein The Southern Railway Company is plaintiff in error and you are defendant in error, to show cause if any there be why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of January, in the year of our Lord one thousand nine hundred and two.

DAVID M. FURCHES,
Chief Justice of the Supreme Court of North Carolina.

[Endorsed:] Original. Southern Railway Co. pl't'ff in error v. J. H. Allison, def't in error. Citation. Service of the within citation, of the petition for writ of error, of the writ of error and of the supersedeas bond, all by copy, is admitted this the 11 day of January A. D. 1902. Justice & Pless, attorney- for J. H. Allison pl't'ff & def't in error. Filed in the supreme court of North Carolina, January 17, 1902.

8 *Summons for Relief.*

McDOWELL COUNTY:

In the Superior Court.

J. H. ALLISON
against
THE SOUTHERN RAILWAY COMPANY.

The State of North Carolina to the sheriff of McDowell county, Greeting:

You are hereby commanded to summon The Southern Railway Company, the defendant above named, if it be found within your county, to be and appear before the judge of our superior court, at a court to be held for the county of McDowell, at the court-house in Marion, N. C., on the fourteenth Monday after the first Monday of January, it being the 15th day of April, 1901, and answer the complaint, which will be deposited in the office of the clerk of the superior court of said county, within the first three days of said term;

and let the said defendant take notice, that if it fail to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 10th day of December, 1901.

THOMAS MORRIS,
Clerk Superior Court.

(Title of Cause.)

Complaint.

The plaintiff, complaining of the defendant, alleges:

I. That the defendant, Southern Railway Company, is, and was at the time hereinafter mentioned, a domestic corporation in the State of North Carolina, and owning and operating a line of railroad and doing the business of a common carrier of freight and passengers in said State and in the county of McDowell.

II. The plaintiff was, on and prior to the — day of ——, 1900, an employee of the defendant company, holding the position and performing the duties of section hand on the defendant's road, on a section thereof which extends through and east of the town of Old Fort, N. C.

III. That it was the duty of said plaintiff, as such employee, to work under the direction and control and obey the orders of the section master on said section, and the plaintiff was subject to be discharged by said section master, who was a vice-principal of the defendant company, if he failed to obey the orders and directions which were given him by the said vice-principal.

IV. That on the — day of ——, 1900, the plaintiff and the other section hands at work on the said section, were directed by said foreman or boss to place a hand car on the track of the defendant company and go thereon with the said foreman to the town of Old Fort,
9 N. C., and while endeavoring to carry out the said order the car on which the plaintiff was riding was struck by an eastbound freight train and the plaintiff was seriously injured, by having his leg and arm broken, and it became necessary, by reason of said injury, to have his arm amputated, and the plaintiff was otherwise seriously and permanently injured, to his great damage.

V. That the collision between the said freight and hand car was on a double or "S" curve, and at a point on the defendant's road where the plaintiff and those persons on the hand car with him could not see the approaching freight train until it was within seventy yards of them, and owing to the noise of the hand car the said freight train could not be heard until it was within sight, and said freight train was running behind its schedule time and at a speed of thirty miles an hour.

VI. That the said vice-principal and section boss, under whom plaintiff was working, knew and it was a part of his duty to know, the schedule time of all trains passing over said section, and it was the duty of said foreman, when passing over said section with a

hand car, at a time when a train was due, to keep a flagman out between the hand car and such train, so that a signal could be given in time to remove the hand car from the track before the train approached, or stop the train until the hand car could be removed.

VII. That the section master, on the day the plaintiff was injured as above alleged, was carelessly, negligently, and in disregard to his duty, was requiring the plaintiff and those working with him to pass over the track in the manner above alleged, without providing a flagman or taking other precautions to avoid a collision with said overdue freight train.

VIII. That plaintiff had not been apprised of his danger or the fact that said train was immediately expected, and was obeying the order of his superior or boss, and relying on him, as it was his duty to do; and after the said freight train came in sight and was discovered by plaintiff, or could have been discovered, it was only six seconds until the plaintiff was injured, as alleged and the plaintiff was, because of his great jeopardy and sudden fright, and his apprehension for himself and those on the hand car and freight train, so frightened that he could not, for the moment, act with the degree of prudence that would have otherwise characterized him.

IX. That the sudden peril in which the plaintiff was so placed, and his consequent and necessary excitement and incapacity for the moment to act with his usual prudence, was without fault on his part, but was wholly due to the negligence and carelessness and wrongful conduct on the part of the said section master and boss, as above alleged.

X. That at the time plaintiff was injured, as alleged, he was endeavoring to obey the immediate directions of the said section master.

XI. That without any fault on his part, but wholly by reason of the negligence and wrongful conduct of the defendant company, the plaintiff was so injured, caused great physical pain and anguish and mental suffering and loss of time and outlay of money, and his capacity to labor is greatly impaired and almost entirely destroyed by reason of his injuries, above alleged, to his great damage, to wit, in the sum of $6,000.

Wherefore, plaintiff prays judgment against the defendant for the sum of $6,000 damages, for the cost of this action, and for such other and further relief as to the court may seem just and proper.

JUSTICE & PLESS,
Attorneys for Plaintiff.

10 (Title of Cause.)

Answer.

The defendant, answering the complaint in this cause, says:

1. That the allegations contained in the first paragraph are not true, and they are denied. Further answering the allegations contained in the said paragraph, defendant says that it is a corporation duly created and organized under the laws of the State of Virginia, and was at the time mentioned in the complaint.

2. That the allegations contained in the second paragraph are true.

3. That the allegations contained in the third paragraph are not true, and they are denied.

4. That the allegations contained in the fourth paragraph are true.

5. That the allegations contained in the fifth paragraph are not true, and they are denied.

6. That the allegations contained in the sixth paragraph are not true, and they are denied.

7. That the allegations contained in the seventh paragraph are not true, and they are denied.

8. That the allegations contained in the eighth paragraph are not true, and they are denied.

9. That the allegations contained in the ninth paragraph are not true, and they are denied.

10. That the allegations contained in the tenth paragraph are not true, and they are denied.

11. That the allegations contained in the eleventh paragraph are not true, and they are denied.

12. That the allegations contained in the twelfth paragraph are not true, and they are denied.

13. And for a further answer and defense to said action, defendant says, that plaintiff contributed to his injury by his own negligence, by attempting to cross the track immediately in front of a moving train, which he saw, or could by reasonable diligence have seen, was approaching.

Wherefore, defendant demands that it go without day and recover its costs.

CHAS. PRICE,
J. L. C. BIRD,
G. F. BASON,
Counsel for Defendant.

NORTH CAROLINA, }
Wake County. }

A. B. Andrews, being duly sworn, says that he is an officer of the defendant, Southern Railway Company, to wit, the first vice-president thereof, that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

A. B. ANDREWS.

Sworn to and subscribed before me, this the 24th day of June, 1901.
H. W. MILLER, *N. P.*

11 (Title of Cause.)

Judgment.

This cause coming on to be heard before his honor M. H. Justice, judge, and a jury, and the issues having been answered in favor of

plaintiff: It is, therefore, considered and adjudged that the plaintiff have and recover of the defendant the sum of $2,000, and the costs of this action, to be taxed by the clerk.

October 26, 1901.

M. H. JUSTICE,
Judge Presiding.

(Title of Cause.)

Petition to Sue in Forma Pauperis.

NORTH CAROLINA,
McDowell County.

J. H. Allison, being sworn, says that he is unable to give the security or make the deposit required by law to enable him to prosecute the above-entitled action against the defendant, The Southern Railway Company, and therefore asks that he be allowed to sue in the said action as a pauper.

his
J. H. x ALLISON.
mark

Witness:
THOMAS MORRIS.

Sworn to before me, this the 30th day of November, 1900.

THOMAS MORRIS,
Clerk Superior Court.

This is to certify that we have examined the case above stated, between J. H. Allison, plaintiff, and The Southern Railway Company, defendants, and we believe that the said plaintiff has a good and meritorious cause of action against the defendant in both law and fact.

This November 30, 1900.

JUSTICE & PLESS, *Attorneys.*

In the above-entitled action, upon the certificate and affidavit above set forth, it is ordered that the said J. H. Allison be allowed to sue and prosecute this action as a pauper.

This November 30, 1900.

THOMAS MORRIS,
Clerk Superior Court.

Undertaking on Appeal.

12 Whereas, on the 21st day of October, 1901, the plaintiff recovered judgment against the defendant in the superior court of McDowell county for the sum of $2,000.

And whereas, the defendant, Southern Railway Company, has appealed therefrom to the supreme court of North Carolina:

Now, therefore, we, Southern Railway Company, and A. B. Andrews, of the county of Wake and State of North Carolina, under-

take, in the sum of $50, that the said Southern Railway Company shall pay all cost that may be awarded against it on such an appeal.

SOUTHERN RAILWAY COMPANY,
By G. F. BASON, *Attorney.*
A. B. ANDREWS. [SEAL].

NORTH CAROLINA, }
Wake County. }

On this, the — day of November, 1901, before me personally appeared A. B. Andrews, to me known to be the person who executed the foregoing bond, and personally acknowledged that he did execute the same.

And the said A. B. Andrews, being duly sworn, says that he is a resident and freeholder, worth doubly the amount of the foregoing bond, exclusive of property exempt from execution and over and above all liabilities.

A. B. ANDREWS.

Sworn to and subscribed before me, this the 6th day of November, 1901.

W. T. SMITH,
Notary Public.

Petition to Remove this Cause from the State Court to the Circuit Court of the United States.

In the Circuit Court of the United States for the Western District of North Carolina.

J. H. ALLISON
against
SOUTHERN RAILWAY COMPANY.

To the honorable the judges of the circuit court of the United States for the western district of North Carolina:

Your petitioner, The Southern Railway Company, respectfully shows that it is the defendant in the above-entitled suit or action, which has not been tried, and has not stood for trial at any term of the State court in which it was brought, but is now pending for trial in the superior court of the State of North Carolina for the county of McDowell, and that it desires to remove the same into the circuit — of the United States for the western district of North Carolina.

Your petitioner further states, that in the above-mentioned suit there is a controversy between a citizen of the State in which the said suit is brought and a citizen of another State, to wit, a controversy between your said petitioner, who avers that it is a corporation duly created and organized under the laws of the State of Virginia, and is not a resident of this State; that it was, at the commencement of this suit, and still is a citizen of the State of Virginia, and the said J. H. Allison, the plaintiff, who, your petitioner avers, was, at the commencement of this suit, and still is a citizen of the

State of North Carolina, in which said State said suit or action
13 was brought, and that both the said J. H. Allison and your petitioner are actually interested in said controversy.

Your petitioner further states, that it has filed herewith an affidavit, that it may be made to appear to the said circuit court that from prejudice and local influence your petitioner will not be able to obtain justice in the said State court, or in any other State court to which your petitioner may, under the laws of this State, have the right, on account of such prejudice and local influence, to remove said cause.

That said suit is brought for the purpose of recovering $6,000 damage for personal injuries alleged to have been caused by the negligence of the defendant, your petitioner, and that the said sum of $6,000 is demanded in the complaint.

Your petitioner therefore prays that the said affidavit may be accepted as good and sufficient, and that the said suit or action may be removed into said circuit court of the United States for the western district of North Carolina aforesaid, and to the end that the said removal may be perfected that such order be made in the premises as the nature of the case may require.

SOUTHERN RAILWAY COMPANY,
By G. F. BASON, *Attorney.*

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

I, G. F. Bason, being duly sworn, do say that I am one of the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof; and that the statements and allegations contained therein are true, as I verily believe.

G. F. BASON.

Sworn to and subscribed before me, this 20th June, 1901.
THOS. W. ALEXANDER, *Notary.*

[Seal of said Notary Public.]

Affidavit of G. F. Bason.

Circuit Court of the United States, the Western District of North Carolina.

(Title of Cause.)

I, G. F. Bason, being duly sworn, do say: that I am one of the attorneys for The Southern Railway Company, defendant in the above-named cause; that I have reason to believe, and do believe, that from prejudice and local influence, the said defendant, Southern Railway Company, will not be able to obtain justice in the superior court in the county of McDowell, State of North Carolina, where the said cause is now pending, nor in any other State court to which the said defendant may, under the laws of the said State, have the right,

on account of such prejudice and local influence, to remove said cause; that the grounds for such belief are, that this affiant has tried many suits against the Southern Railway Company and its predecessors in the superior court of the said county of McDowell, and in every instance where said cause or causes have been submitted to a jury the verdict has been against the said railroad company, without regard to weight of evidence.

Affiant further says that such prejudice exists not only in
14 the county of McDowell, but in any county to which the defendant may, under the laws of North Carolina, have a right to remove said cause.

G. F. BASON.

Sworn to and subscribed before me this the 20th day of June, 1901.

THOS. W. ALEXANDER, *Notary.*

[Seal of said Notary Public.]

Bond for the Removal of this Cause to the United States Circuit Court for the Western District of North Carolina.

Circuit Court of the United States for the Western District of North Carolina.

(Title of Cause.)

Know all men by these presents, that the Southern Railway, as principal, and A. B. Andrews, of Wake county, North Carolina, as surety, are held and firmly bound unto J. H. Allison and all other persons whom it may concern, in the penal sum of $500, for the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Southern Railway Company, having petitioned the circuit court of the United States for the western district of North Carolina for the removal of a certain cause pending in the superior court of McDowell county, in the State of North Carolina, wherein J. H. Allison is plaintiff and The Southern Railway Company is defendant, to the circuit court of the United States, in and for the western district of North Carolina:

Now, therefore, if The Southern Railway Company, the petitioner, shall enter into the said circuit court of the United States on the first day of its next session, a copy of the said suit, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States, if the said court shall hold that this suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals, this — day of June, 1901.

SOUTHERN RAILWAY COMPANY,
By G. F. BASON, *Attorney.*
A. B. ANDREWS. [SEAL.]

Bond for removal.

STATE OF NORTH CAROLINA, }
County of Wake. }

I, A. B. Andrews, of said county of Wake and State of North Carolina, the surety named in the foregoing bond, being duly sworn, depose and say: That I am a resident of the State of North Carolina, and a property-holder therein; and that I am worth the sum of $500 over and above all my debts and liabilities, and exclusive of property exempt by law from execution, and that I have property in said State of North Carolina liable to execution of the value of more than five hundred dollars.

A. B. ANDREWS.

Sworn to and subscribed before me, this 24th day of June, 1901.

[Seal of said Notary Public.]

H. W. MILLER,
Notary Public.

15 *Order of Removal of this Cause to the Circuit Court of the United States for the Western District of North Carolina.*

In the Circuit Court of the United States for the Western District of North Carolina.

(Title of Cause.)

This cause coming on to be heard, upon the complaint and answer, and the petition, affidavit and bond filed herein by the defendant, Southern Railway Company, under the provisions of the act of Congress of the United States; and it appearing that this court has jurisdiction of this suit or action, and it being made to appear to this court that, from prejudice and local influence, The Southern Railway Company, a citizen of the State of Virginia, and defendant in this suit or action, will not be able to obtain justice in the superior court of McDowell county, it being the State court, nor in any other State court to which the said defendant may, under the laws of the State of North Carolina have the right, on account of such prejudice and local influence, to remove said cause, it is found as a fact that such prejudice and local influence do exist, as set out in the petition and affidavit filed in this cause:

It is therefore, on motion of counsel for defendant, Southern Railway Company, considered and ordered, that the petition, bond and affidavit filed herein are sufficient, and that the same are accepted and approved.

It is further ordered and adjudged, that the clerk of this, the circuit court of the United States, certify to the State court,
16 to wit, the superior court of the county of McDowell, the same being within this the western district of North Carolina, this order of removal, together with copies of the petition, bond and affidavit, to the end that the State court may be advised of the action of this court and of its order of removal; and to the further end that the said State court may proceed no further with the said suit or

action; and to the end, also, that the said State court may direct the clerk of the superior court of the county of McDowell to make a full and complete transcript of the record of the said suit or action, and certify the same to this court for trial.

And it is so ordered.

This 25th day of June, 1901.

JAS. E. BOYD,
U. S. Judge.

Clerk's Certificate.

I, H. C. Cowles, clerk of the circuit court of the United States for said district, at Statesville, N. C., do hereby certify the foregoing to be true copies of the petition, affidavit, bond for costs and order of removal of said cause to this court, as fully as the same remain of record and on file in said cause in this office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court at office, this the 5th day of July, A. D. 1901.

H. C. COWLES,
Clerk of said Court.

[Seal of said Clerk.]

17 (Title of Cause.)

Case on Appeal.

This was a civil action, tried before Justice, judge, and a jury at the October term, 1901, of the superior court of McDowell county.

The plaintiff brought this action for $6,000 damages for personal injuries alleged to have been caused by the negligence of the defendant.

The contentions of the parties are fully set out in the pleadings, which are contained in the record proper.

The defendant moved to dismiss this case from the docket, for that the same had been regularly removed to the circuit court of the United States, and exhibited the proceedings, to wit, the petition, affidavit and bond of defendant, and order of removal made by the judge of United States courts. This motion was made at August term, 1901, of the court, and was overruled, when the following order was made by the judge:

Order Refusing Removal.

(Title of Cause.)

In this case it appears to the court that the circuit court of the United States has caused an order for the removal of the case to the circuit court of the United States, upon petition setting forth that the defendant is a non-resident of the State of North Carolina; and it further appearing to the court, by the admission of defendant, through its counsel, that the defendant has complied with the terms of the act of the legislature of the State of North Carolina, being chapter 62 of the acts of the General Assembly of North Carolina at its session of 1899: It is thereupon considered by the court that the

defendant is a corporation of this State by virtue of said act, and that it is not entitled to remove this cause to the Federal court. It is further considered by the court, that the courts of the State of North Carolina have jurisdiction of this cause, and this court declines to surrender jurisdiction thereof. It is ordered by the court, that a copy of this order be sent to the clerk of said circuit court of the United States by the clerk of this court.

(To this order defendant excepted.)

At the time this order was made the plaintiff insisted upon his right to try, but the court ordered the continuance, the judge stating to the defendant's counsel that it would stand for trial at the next term. And at October term, when the case was called for trial, the motion was again made by defendant to continue, and refused.

(To this order defendant excepted.)

18 *Issues and Verdict.*

The following issues were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer. "Yes."

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?

Answer. "No."

3. What damages did the plaintiff sustain?

Answer. "$2,000."

The jury found all issues in favor of the plaintiff and assessed his damages at $2,000.

(There was a motion for a new trial. Motion overruled, and defendant excepted. Eleventh exception).

There was a judgment according to the verdict, which is set out in the record proper, and from this judgment the defendant, on October 25, 1901, appealed in open court to the supreme court of North Carolina.

The court adjourned for the term October 31, 1901.

Notice waived. Appeal bond in the sum of fifty dollars ($50) adjudged sufficient.

Assignments of Error.

The defendant assigns as error:

1. The refusal of the court to dismiss this cause, because the same had been regularly removed to the Federal court, as provided by law.

The above case, as modified, is, by consent of counsel, settled as the case on appeal.

M. H. JUSTICE,
Judge Fourteenth District, Presiding.

November 12, 1901.

Clerk's Certificate.

NORTH CAROLINA, }
McDowell County. }

I, Thomas Morris, clerk of superior court for the county of McDowell and State of North Carolina, do hereby certify the foregoing to be a true copy of the record in the above-entitled cause as fully as the same remain- of record and on file in said cause in this office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, this the 13th day of November, 1901.

[SEAL.] THOMAS MORRIS,
Clerk of Superior Court, McDowell County.

(*Docket Entries.*)

Defendant's appeal docketed Nov. 15, 1901, argued Nov. 29, 1901. Opinion delivered Dec. 17, 1901, as follows:

19 N. C. Supreme Court, August Term, 1901.

McDOWELL:

J. H. ALLISON
v.
SOUTHERN RAILWAY CO., Appellant. } # 473.

Geo. F. Bason, for appellant.
Justice & Pless, for appellee.

MONTGOMERY, *J.:*

The defandant is now and was at the time of the commencement of this action a domestic corporation originally created and organized under the laws of the State of Virginia, and, by proceedings in the circuit court of the United States for the western district of North Carolina, obtained an order for the removal of the action from the superior court of McDowell county to the circuit court of the United States in and for the western district of North Carolina.

The plaintiff in his complaint alleged his damages to be $6,000, and the order of removal was based upon affidavits alleging local prejudice. The proceedings were certified to the superior court of McDowell county, and a motion of defendant's counsel to dismiss the action from the docket because of the order of removal was refused by his honor. The reason assigned for his honor's refusal to dismiss the action, or to stay proceedings in the State court, was that the defendant had complied with the terms of the act of the legislature of the State of North Carolina, chapter 62 of the Acts of 1899 and thereby became a corporation of this State. The ruling of his honor is sustained by the cases of Debnam *v.* Telephone Co., 126 N. C. 831 and Layden *v.* Knights of Pythias, 128 N. C. 546.

The defendant then moved to continue the cause on the alleged ground that the petition of the plaintiff to sue *in forma pauperis*

showed that his counsel had taken the case for a contingent fee, and was therefore "a partner in the suit, as much so, as if his name had appeared in the summons and the complaint;" and also upon the ground that plaintiff's counsel was a son of the judge before whom he proposed to try the case. His honor we think properly refused the motion.

The plaintiff in his affidavit affirmed that he was unable to give a prosecution bond in the sum of $200, or to make a deposit of like amount for the same purpose; but it did not necessarily follow that he was unable to compensate his counsel in some way other than by a division of the amount of recovery, or that his counsel had
20 not assumed the prosecution of the suit without compensation.

But suppose it was the contract between the plaintiff and his attorney that the attorney's compensation should be contingent upon recovery and that fact should have been known to his honor, should his honor have declined to preside over the trial, as judge, because of the interest which his son had in the recovery? We know of no law which requires such a course on his part. The judges of our courts are presumed to be men of character and learning, and not to be influenced by fear, favor or affection towards any suitor or attorney in causes before them. And especially in this case does the judge seem to be justified in proceeding with the trial. He stated "that he knew not nor cared what arrangements counsel had with client as to fees. That he had no interest whatever in the matter, and that he was fully conscious of his ability to try the case with absolute impartiality. That he had two sons practicing law in his district who had been often appearing and trying cases before him, and that to grant this motion now would be to make an admission of his inability to hear their cases impartially, which his feelings did not justify, and which he did not feel called upon to make; besides, it appeared to the court that, at the local bar meeting, when the calendar for this term was made, one of the defendant's counsel was present and requested that this case be placed on the calendar a day certain with other cases for the accommodation of other of defendant's counsel, and that it was so arranged for trial, and that out of twenty cases on the calendar Justice & Pless appeared in eighteen of them, and this was the first case called for trial, and a continuance of this on such ground would set a precedent to continue the calendar and adjourn the court. That the judge then stated that unless other grounds for continuance were offered, he would proceed to try the case, as he could not abdicate the bench or disbar his relatives from practicing by granting continuances upon this ground."

The fifth and sixth exceptions of the defendant concerned certain instructions given by his honor on the question of the defendant's negligence The fifth exception is to that part of the charge which is in this language

21 "If you believe from the evidence that the plaintiff was a section hand, and Martin was a track foreman or section boss in the employment of defendant company, and was a vice-principal of the plaintiff, and the duties of the plaintiff and Martin are as set out in the printed rules introduced in evidence, and that Martin

ordered his hand car put on the track by plaintiff and others and ordered plaintiff and others to go on said car towards Old Fort, said Martin knowing there was a past-due train liable to come along the track meeting them, and the said Martin, without informing plaintiff of the danger, met the train at a point where it could not be seen by those on the hand-car until it was within 510 feet of them, and would reach the point where the hand car was in *to* nine to ten seconds, and said Martin had not sent out a flagman or taken other precaution to protect the plaintiff, this would be negligence on the part of defendant, and the plaintiff would not be guilty of negligence in riding on said hand car."

And the sixth exception is to that portion of the charge which is in these words:

It was his duty to listen and look, and in case danger was reasonably to be apprehended from a belated train or otherwise, to send a flagman in front of the hand car to notify the engineer on the train, so that the train might be stopped or slowed up, or by bell or whistle give notice of its approach, in order that the hand-car crew might save themselves from danger. If you find that there was negligence on the part of the track foreman in his duties as just defined to you, and find that he was the defendant's agent, as I have described the agency to you, and plaintiff's superior, and further find that the injury occurred, if it did occur in the preformance of the duties conferred on the agent, and that Martin negligently ordered plaintiff to go on the track to remove the car, and that the injury was the result of the negligence of Martin, then you will answer the first issue "Yes."

There was evidence on the part of the plaintiff going to show that the plaintiff and others were, at the time of the plaintiff's injury, under the control and management of a man by the name of Martin and that he was the section master, or track foreman of the defendant company, and that he hired and discharged hands without consultation or advice from anybody; that a day's labor on the part of Martin's employees began in the morning when they put the car on the track, and ended after the hand car was put in the tool-house; that when the day's work was over and Martin and the hands upon the hand car were returning to their homes, they met sud-
22 denly, a freight train that was known to be late by both Martin and the plaintiff, and at a distance of about one hundred yards off before it was seen—the view of the approaching train being obstructed by a curve in the shape of an S; that no signals or precaution had been taken by Martin to discover the approach of the belated train, as was required by the rules of the company.

The rules and regulations of the company in respect to track foremen were introduced, and from them it appeared that the track foreman had charge of the track, laborers and road watchmen employed upon that section; that a constant lookout should be kept for trains, and that when there was not a clear view of the track far enough to insure absolute safety, flagmen must be sent out with danger signals to protect them.

There was also evidence on the part of the plaintiff tending to

show that the whole party jumped from the hand car when they saw the rapidly approaching train about a hundred yards off, and were in places of safety, but at the sudden and peremptory command of Martin the plaintiff attempted to go back and lift the hand car from the track, and in so doing was struck by the engine and badly hurt.

Upon that testimony we can see no error in the instructions of his honor, which have been complained of. The *defendant* was negligent whether he informed the plaintiff or did not inform him of the danger of a collision.

On the question of whether the plaintiff contributed to his own injury, the defendant excepted (8th exception) to the following instruction of his honor: "If however the act required of the plaintiff was essentially hazardous, he was not bound by his duties to obey the orders, and would not be exculpated from the charge of contributory negligence. By the language 'essentially hazardous,' is meant apparent certainty to plaintiff that the act would cause injury." There was no error in that instruction under the evidence and circumstances of this case. Ordinarily, however, that would not be the rule, and a person would certainly be guilty of contributory negligence if he obeyed the orders of his superior in cases where it appeared reasonably certain that his obedience would be attended with injury to himself. In Hinshaw *v.* Railroad, 118 N. C. 1047 where a passenger, after having been told by the conductor to get off, did so and was
23 hurt because the place was not a safe one for him to alight, all of which was seen and known by the plaintiff, this court said "The danger must not only be apparent but great—more chances against a safe exit than in favor of it." That we think would be a safe rule to be applied ordinarily in cases where employees were ordered by their superiors to do certain acts in the ordinary course of their business. But in cases like the one now before the court, where there was em-inent peril of a collision between a train moving at 30 or 35 miles an hour down-grade, and a hand car, its occupants being greatly excited and disturbed by the sudden approach of the train, we think, as did his honor, that in the effort to prevent the effects of such a collision an order from the foreman to an employee to return to the track to throw the hand car off could be obeyed without culpability on the part of the employee, unless it was certain that in doing so injury would occur to him.

Further, under the head of contributory negligence his honor instructed the jury that "if the plaintiff was an employee of defendant, and by reason of the negligence of the defendant through a vice-principal, Martin, put in sudden peril and great danger, and immediately after the plaintiff had extricated himself from his hazardous and dangerous position, was commanded by such vice-principal to help get a hand car off the track, and if, in attempting to obey this order, was hurt, the law in regard to the contributory negligence of the plaintiff is as follows—'If the agent of the employer' and the vice-principal of the plaintiff 'suddenly commanded the plaintiff (a laborer) to do an extra-hazardous act in the course of his duty, one that may, though not probably, be safely done by ob-

serving due care, one that must be done at once, if done at all, and if the laborer obeys the command promptly, moved only by a faithful sense of duty, and as a consequence suffered serious bodily injury—in that case the injured party does not contribute to his own injury.'"

We think the instruction a proper one, and that the law as announced in Patton *v.* Railroad, 96 N. C. 456 supports the charge.

The other exceptions of the defendant are only variations in
24 the manner of their statement of the principles of law which we have discussed, and it is not necessary to particularly consider them.

No error.

Douglas J. concurs in the result.

25 FURCHES, *C. J.*, concurring in the judgment:

This action is *in forma pauperis*, and the counsel of plaintiff is the son of the judge presiding at the trial. When the case was called for trial the defendant called the attention of the court to this fact, and alleged that the plaintiff's counsel was prosecuting the case under a contract for a part of the recovery as a contingent fee. The plaintiff's counsel in arguing this motion, called it extraordinary, but did not deny the facts alleged by the defendant. The court refused the motion, giving his reasons therefor, as set out in the opinion of this court.

The motion was not alone made upon the ground that the presiding judge was the father of plaintiff's counsel. If it had been made upon this ground alone, it would have been extraordinary, and contrary to the uniform practice in this court and in the superior courts of the State.

The record states the motion as follows: "The defendant then moved to continue the case, for that, as was sufficiently shown by the petition of plaintiff to bring this suit *in forma pauperis*, his counsel, E. J. Justice, had taken the same for a contingent fee, and was therefore a partner in the suit, as much so as if his name had appeared in the summons and complaint." This was the motion, and the judge in assigning his reasons for refusing it (among other things) said "that he knew not nor did he care what arrangement counsel had made with his client as to fees; that he had no interest whatever in the matter and that he was fully conscious of his ability to try the case with absolute impartiality * * * ; that out of twenty cases on the calendar, Justice & Pless appeared in eighteen of them, and this was the first case called for trial, and a continuance of this case on such grounds would set a precedent to continue the calendar and adjourn the court."

To make a continuance of this case a precedent for continuing the other 17 cases, would be to put them on the same footing as this case, that is, that they were all *paumer cases brought for contingent fees*. This I am satisfied was not the case and the reason assigned, as I think, does his son injustice. And it may be that it does his

other son injustice, as I am inclined to think it does. If the
26 motion had been made to continue for the reason alone that the plaintiff's counsel was the son of the presiding judge, then the grounds stated would have been correct.

The law of this State adopting the law of England as far back as Eleventh Henry VII did not allow an attorney "to take any fee or reward" for his services in pauper suits. Revised Statutes ch. 31 sec. 153; Rev. Code ch. 31 sec. 43, which continued to be the law until the adoption of the code, as it was regarded as a species of champetery. But that is not the law now and probably never will be again. But it is doubtful whether there should not be some legislation with regard to such fees.

Under the law, as contained in the Revised Statutes and the Revised Code an administrator was not allowed to bring and prosecute a suit *in forma pauperis*. McKeil *v.* Cutler, 45 N. C. 139. This question, so far as I am advised has not been presented to the court since the act of 1868–'9 (Code sects. 210, 211). But no such motion was made in this case, and no such question is before the court now; and I know the practice has been otherwise since the adoption of the code.

I shall take it then, at least so far as this case is concerned, that Mr. Justice had the right to bring this suit *in forma pauperis* and to contract with his client for a part of the recovery as a contingent fee, and this brings up the question of his pecuniary interest in the recovery. And taking it that he had a direct pecuniary interest in the recovery, or that he was to have all the recovery, or that it had been his own action, I know of no law in this State that would have prevented his father from trying the case. This I think was altogether a matter of propriety with him and for him to determine—whether he would or not try the case; and I see no legal grounds upon which this exception can be sustained.

27 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of McDowell county:—Upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable W. A. Montgomery, justice, be certified to the said superior court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this court incurred, to wit, the sum of ten $\frac{30}{100}$ dollars ($10.30), and execution issue therefor.

28 SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
JAMES H. ALLISON, Defendant in Error.

Agreement.

It is agreed between counsel for plaintiff and defendant, in the above-entitled case, that in making up the record for the Supreme Court of the United States, there shall be omitted the portions of the printed record on file in the supreme court of North Carolina commencing with the twenty-fifth line on page eighteen down to and including line seventeen on page fifty-one; also commencing with line nine on page fifty-two down to and including the names of attorneys on page fifty-three. All other portions of said record and the decision and opinion of the supreme court of North Carolina, delivered by Mr. Justice Montgomery, shall be certified to the Supreme Court of the United States as a part of the record in this above-entitled case.

January 18, 1902.

F. H. BUSBEE,
Attorney for Plaintiff in Error.
JUSTICE & PLESS,
Attorneys for Defendant in Error.

Certificate.

I Thomas S. Kenan, clerk of the supreme court of North Carolina do certify the foregoing to be a true and correct copy (subject to the above stipulation of counsel) of the record in the above-entitled action, as appears from the files of this court.

Given under my hand and seal of said court at office in Raleigh on this the 21st day of January, 1902.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court of N. C.

Endorsed on cover: File No. 18,392. North Carolina supreme court. Term No. 232. Southern Railway Company, plaintiff in error, *vs.* John H. Allison. Filed February 1st, 1902.